

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	EB Docket No. 02-367
RADIO MOULTRIE, INC.)	EB-01-IH-0259
)	Facility #54680
Licensee, Station WMGA(AM), Moultrie,)	FRN #0007570443
Georgia)	

ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR HEARING

Adopted: November 21, 2002

Released: November 26, 2002

By the Commission:

I. Introduction

1. In this Order, pursuant to Sections 312(a), 312(c), and 503(b) of the Communications Act of 1934, as amended ("the Act"),¹ we commence a hearing proceeding to determine whether the above-captioned license held by Radio Moultrie, Inc. ("RMI") should be revoked for its failure to comply with 310(d) of the Act,² and Section 73.3540 of the Commission's rules (application for voluntary assignment of control),³ by transferring control of Station WMGA(AM) to Dixie Broadcasting, Inc. ("DBI"), Aubrey Smith ("Smith"), and Sam and Gracie Zamarron ("the Zamarrons") without prior authorization of the Commission; and for its willful and repeated failure to respond to official Commission correspondence ordering it to respond.

2. Also, pursuant to Section 1.80(g) of the Commission's rules,⁴ this Order constitutes notice of opportunity for hearing to determine whether, in addition to or as an alternative to license revocation and/or cease and desist order, monetary forfeitures should be imposed against RMI for violations of the Act and the Commission's rules.

II. Background

3. The licensee of record for Station WMGA(AM) is RMI. However, we received information suggesting that DBI, and/or others,⁵ may have improperly acquired control of the

¹ 47 U.S.C. §312(a); §312(c); §503(b).

² 47 U.S.C. § 310(d).

³ 47 C.F.R. § 73.3540.

⁴ 47 C.F.R. §1.80(g).

⁵ This information was obtained from an FCC field agent, who interviewed Mr. Aubrey Smith. Mr. Smith

station through the acquisition of station assets following the station's last license renewal on September 19, 1996. In this connection, our records do not reflect that RMI sought or obtained Commission approval for the alleged assignments of license.

4. According to our records, RMI has been the licensee of Station WMGA(AM) since approximately September 6, 1991.⁶ The Commission's records do not reflect that any agreement to sell the station was filed, pursuant to Section 73.3613(b) of the Commission's rules, which requires the reporting of contracts, instruments or documents relating to present or future ownership or control of the licensee, let alone any Commission approval of a transfer of control.'

5. On April 13, 2001 and April 23, 2002, we sent inquiry letters to both RMI and DBI to investigate whether RMI violated Section 310(d) of the Act, and Section 73.3540 of the Commission's rules by transferring control of Station WMGA(AM) to others, including DBI, without prior authorization of the Commission, as well as whether it has violated other rules. Both letters specifically "directed" KMI and DBI to respond. On August 28, 2001, DBI filed its response to our first inquiry. No response has been received from RMI to either our April 13, 2001, or April 23, 2002, letters directing it to respond.

6. An on-site inspection on March 21, 2001, further revealed that the station has apparently violated Section 73.1745 (unauthorized power) by failing to change to its critical hours directional array as required by its license;⁷ Section 17.50 (antenna cleaning and repainting) by failing to repaint its tower structures after seventy-five percent of their orange and white paint had flaked off;⁹ Section 17.51 (time when lights should be exhibited) by leaving its towers completely unlit during nighttime hours;¹⁰ Section 17.48 (notification of extinguishment or improper functioning of lights) by failing to report the station's tower light extinguishment to the FAA Flight Service Station nearest Moultrie, Georgia;¹¹ Section 17.4 (antenna structure registration) by failing to register its station towers with this agency;¹² Section 11.35 (equipment operational

represented that he has been attempting to purchase the station from DBI's principal, Mr. Gary Mitchell. Mr. Smith further represents that DBI acquired the station through a lien-satisfaction proceeding conducted several years ago.

'This reflects the date that the Commission granted the transfer of control of the station's licensee to Dr. James Charles Elder, Sr., G. Chris Elder, and Douglas M. Sutton, Jr. from James D. Hardy and Douglas M. Sutton, Jr. See File No. BTC- 910403EB. That application was filed to seek approval of a prior transaction that was found to have constituted an unauthorized transfer of control. See *In re Liability of Radio Moultrie, Inc.* (MMB 1992). reduced on reconsideration, *Memorandum Opinion and Order*, 8 FCC Rcd 4266 (MMB 1993) (original forfeiture amount of \$10,000 reduced to \$1,000 based on finding of financial hardship).

⁷ 47 C.F.R. §73.3613(b)

⁸ 47 C.F.R. §73.1745

⁹ 41 C.F.R. §17.50

¹⁰ 41 C.F.R. §17.51

¹¹ 47 C.F.R. §17.48

¹² 47 C.F.R. §17.4

readiness) by failing to maintain EAS equipment readiness;" Section 11.15 (EAS operating handbook) by failing to maintain a copy of the EAS Operating Handbook at normal duty stations;" Section 73.1820 (station log) by failing to keep a station log;" Section 73.1125 (station main studio location and staffing) by leaving the station's main studio **unattended**;¹⁶ and Section 73.1870 (chief operators) by failing to designate a chief operator at the station."

III. Discussion

7. *Unauthorized Transfer of Control.* Section 310(d) of the Act provides in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, voluntarily, directly or indirectly, or by transfer of control of any corporation except upon application to the Commission and upon finding by the Commission that **the** public interest, convenience and necessity will be served thereby

8. As noted above, Section 310(d) of the Act prohibits the transfer of control of a station license, and any rights thereunder, without prior Commission consent. There is no exact formula by which control of a broadcast station can be determined. In ascertaining whether a transfer or reversion of control has occurred, the Commission traditionally looks beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Specifically, the Commission looks to three essential areas of station operation: programming, personnel, and finances. *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 R.R. 2d 1346 (1982).

9. The Commission has consistently held that a licensee's participation in a time brokerage ("TBA") or local marketing agreement ("LMA"), does not *per se* constitute an unauthorized transfer of control or a violation of the Act or any Commission rules or policies. *See, e.g., WGPR, Inc.*, 10 FCC Rcd 8141 (1995); *Roy R. Russo, Esquire*, 5 FCC Rcd 7586 (MMB 1990); *Joseph A. Belisle, Esquire*, 5 FCC Rcd 7585 (MMB 1990). As with any allegation of unauthorized transfer or reversion of control, without regard to whether a time brokerage agreement exists, we look to whether a licensee continues to have ultimate control over the station, including its programming, personnel, and finances. Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to those three areas, as long as they continue to set the policies guiding those operations. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *The Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). Thus, in making a determination, the Commission looks not only to who executes the programming, personnel, and finance responsibilities, but also

¹³ 47 C.F.R. § 1.1.35.

¹⁴ 47 C.F.R. § 11.15

¹⁵ 47 C.F.R. § 73.1820

¹⁶ 47 C.F.R. § 73.1125

¹⁷ 47 C.F.R. § 73.1870

to who establishes the policies governing those three areas. *See WGPR, Inc.*, 10 FCC Rcd at 8142.

10. In its August 28, 2001, response, DBI represented that it had planned to acquire WMGA(AM) from RMI, and that the parties entered into an oral TBA in November 1998, so that DBI could operate the station until an agreeable purchase price could be determined. However, an agreement on price was never reached. Thereafter, DBI indicates that it was approached by RMI's mortgagor and former controlling principal and shareholder, James Hardy, and offered the sale of the licensee's then-delinquent note.¹⁸ DBI represents that it completed purchase of the note via lien-satisfaction proceedings in April 2000. DBI alleges that, at this point, RMI ceased to communicate with it, and refused to cooperate in filing consensual license assignment applications with the Commission. DBI maintains that it continues to pay RMI its contract amount *under* the TBA, that it now owns the station's real estate and equipment, but "not the licenses." Finding it difficult to work with RMI's principal, G. Chris Elder, and unable to devote sufficient time to broadcasting, DBI indicates that it thereafter entered into a further TBA and "sub-lease" with Smith, and the Zamarrons in December 2000, contingent upon a future asset sale arrangement. DBI represents that Smith and the Zamarrons have operated the station since that time.

11. Section 73.3540 of the Commission's rules requires that prior consent of the **Commission** must be obtained for a voluntary assignment or transfer of control. Section 73.3541 of the Commission's rules further requires that the Commission shall be notified in writing promptly of the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee, and that, within thirty days after the occurrence of such death or legal disability, an application on Form 316 shall be filed requesting consent to involuntary assignment of such permit or license or of involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to its interests. No such applications were filed in this case.¹⁹ Moreover, the record indicates that RMI abdicated *de facto* control of the station at some point subsequent to entering into the oral TBA with DBI in November 1998, and that RMI's relinquishment of control appears to have continued unabated since that time.²⁰ Thus, RMI's conduct raises the question of whether it has violated Section 310(d) of the Act and the pertinent Commission rules by transferring control of the station to others without prior FCC consent.

12. *Failure to Respond to Commission Directives.* The Bureau twice ordered RMI to provide a response to inquiry letters and RMI twice failed to comply with the Bureau orders. Licensees *are*, of course, *required* to comply with Commission orders including those requiring the provision of information. *See In re Peninsula Communications, Inc.*, 16 FCC Rcd 16124, 16128 (2001) (subsequent history omitted); *see also In re SBC Communications, Inc.*, 17 FCC

¹⁸ According to DBI, James Hardy held a security agreement and promissory note concerning the station's physical assets. *See also* File No. BTC-920730EA.

¹⁹ As noted above, DBI claims to have acquired the station's physical assets through purchase of the Hardy note in April 2000, and contends that RMI **would** not cooperate in seeking consensual transfer of the license. In this case, it **appears** that DBI may seek FCC approval by filing an involuntary transfer of control application (FCC Form 316) and conforming substantial transfer of control application (Form 315). To date, DBI has not done so.

²⁰ RMI appears to have relinquished *de jure* control in April 2000, when DBI acquired the station's assets through lien-satisfaction proceedings.

Rcd 7589. 7595 (2002). Without such licensee cooperation, the Commission's ability to regulate effectively is seriously undermined.

13. In this case, RMI has not responded to the Commission's two inquiry letters seeking to ascertain the circumstances surrounding its operation of WMGA(AM). In this regard, on April 13, 2001 and April 23, 2002, the staff issued detailed letters of inquiry questioning whether RMI violated Section 310(d) of the Act, and Section 73.3540 of the Commission's rules by transferring control of Station WMGA(AM) to others, including DBI, without **prior** authorization of the Commission, as well as whether it has violated other rules. The staff sent the letters of inquiry by certified mail, return receipt requested, both to RMI and DBI, to their addresses of record, and these specifically "directed" that responses be filed within thirty days. On August 28, 2001, DBJ responded to our first inquiry, providing us with our only information about this case. RMI did not respond to either the April 13, 2001, or April 23, 2002, queries, although postcards were returned indicating that G. Chris Elder, Susan Fuller Elder, and Paul Sullivan accepted delivery of the letters on behalf of RMI.²¹ Thus, RMI's conduct raises the question of whether it has violated Commission directives by persistently failing to respond to the staffs inquiries.

14. RMI's continued failure to respond to the staff directives raises the question whether it did so deliberately to avoid the *Commission's ascertainment* of the true facts surrounding its operation of the station and exacerbates the question whether unauthorized control has occurred at the station. This persistent failure to respond to Commission inquiries, coupled with an apparent unauthorized transfer of control, warrants designation for hearing. *See In re William E. Blizzard, Jr., t/a Macon County Broadcasting Co.*, 25 FCC 2d 926 (1970) (Commission found the licensee's repeated failure to respond to staff inquiries dilatory and warranting of designation); *In re Revocation of the License of Shedd-Agard Broadcasting, Inc. (KLSU)*, 41 FCC 2d 93 (I.D. 1973).

IV. Ordering Clauses

15. Accordingly, IT IS ORDERED THAT, pursuant to Sections 312(a)(2), 312(a)(4) and 312(c) of the Act, 47 U.S.C. §§ 312(a)(2), 312(a)(4) and 312(c), and Section 1.91 of the Commission's rules, 47 C.F.R. § 1.91, RMI is hereby ORDERED TO SHOW CAUSE why its license for broadcast station WMGA(AM), Moultrie, Georgia, SHOULD NOT BE REVOKED. RMI shall appear before an Administrative Law Judge at a time and place to be specified in a subsequent Administrative Law Judge order and give evidence upon the following issues:

- (a) To determine the facts and circumstances surrounding RMI's operation of WMGA(AM), Moultrie, Georgia, in connection with possible violation of Section 310(d) of the Act, and/or Sections 73.3540, 73.3615(a), 73.1745, 17.50, 17.51, 17.48, 17.4, 11.35, 11.15, 73.1820, 73.1125, and 73.1870 of the Commission's rules, as well as orders from the Enforcement Bureau to provide responses to letters of inquiry;²²

²¹ The staff's letter of inquiry to RMI was sent by certified mail both to its official business address according to Commission records, 1151 Hendricks Street, Covington, GA 30209, and to Mr. G. Chris Elder, RMI's corporate principal, at his personal address, 1140 Milstead, GA 30012. Signed receipts for both letters were returned to the FCC by postcard.

²² In addition to the unauthorized transfer of control and failure to respond to Commission inquiry concerns

- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether RMI has the requisite qualifications to **be** or remain a Commission licensee and thus whether **its** captioned broadcast license should **be** revoked.

16. IT IS FURTHER ORDERED that, without regard as to whether the hearing record warrants an order that RMI's license to operate WMGA(AM) be revoked, it shall be determined, pursuant to Section 503(b) of the Act, whether an ORDER FOR FORFEITURE in an amount not to exceed \$300,000,²³ shall be issued against RMI for the willful or repeated violations of Section 310(d) of the Act, and/or Sections 73.3540, 73.3615(a), 73.1745, 17.50, 17.51, 17.48, 17.4, 11.35, 11.15, 73.1820, 73.1125 and 73.1870 of the Commission's rules, as well as orders from the Enforcement Bureau to provide responses to letters of inquiry.

17. IT IS FURTHER ORDERED THAT, to avail itself of the opportunity to **be** heard and to present evidence at a hearing in this proceeding, RMI, pursuant to Section 1.91(c) of the Commission's rules, 47 C.F.R. § 1.91(c), **SHALL**, within thirty days **of** its receipt of this ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR **HEARING**, file with **the** Commission a written appearance slating that it will appear at the hearing and present evidence on the issues specified above. An unexcused failure to each file a timely notice of appearance will constitute a waiver of such hearing, pursuant to Section 1.92(a)(1) of the Commission's rules, 47 C.F.R. § 1.92(a)(1).

18. IT IS FURTHER ORDERED THAT, if the hearing is waived, RMI **may** submit written signed statements pursuant to Section 1.92(b) of the Commission's rules, 47 C.F.R. § 1.92(b), which can deny, seek to mitigate, or justify its conduct with respect to Station WMGA(AM). In the event that KMI waives its right to a hearing, the Chief Administrative Law Judge (or presiding officer if one has been designated) shall, at **the** earliest practicable date, issue an order as to each reciting the events or circumstances constituting a waiver of hearing, terminating the hearing, and certifying RMI's case to the Commission. **See** Section 1.92(a)-(c) of the Commission's rules, 47 C.F.R. § 1.92(a)-(c).

19. IT IS FURTHER ORDERED THAT, pursuant to Section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau shall serve as trial staff in this proceeding.

20. IT IS FLJRTHET ORDERED THAT, pursuant to Section 312(d) of the Act, 47 U.S.C. § 312(d), and Section 1.91(d) of the Commission's **rules**, 47 C.F.R. § 1.91(d), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission with respect to the alleged misconduct of RMI.

that lie at the heart of our decision to initiate a revocation proceeding, we have included apparent violations from the March 21, 2001, inspection so the Administrative Law Judge may consider such evidence **as** part of the record.

²³ 47 C.F.R. § 1.80. The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new **rates** apply to violations that occur **or** continue after November 13, 2000. **See Order**, "In the Matter of Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation." 15 FCC Rcd 18221 (2000).

21. IT IS FURTHER ORDERED THAT, pursuant to Sections 312(c) and 301 of the Act, 47 U.S.C. §§ 312(c) and 301, copies of this ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR HEARING shall be sent by Certified Mail Return Receipt Requested to Radio Moultrie, Inc., 1151 Hendricks Street, Covington, Georgia 30209; to **Mr. G. Chris Elder**, 1140 Milstead, Georgia, 30012. Courtesy copies shall be **sent** via **regular** mail to Mr. **Gary A. Mitchell d/b/a Dixie Broadcasting, Inc.**, 30 North Norton Avenue, Sylacauga, Alabama, 35150; to Mr. Aubrey Smith. P.O. Box 2239, Tifton, Georgia, **31793**; and to Sam **and** Gracie Zamarron, P.O. Box 2239, Tifton, Georgia, 31793.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary